(3)

Supreme Court, U.S.
FILED
DEC 26 2002
OFFICE OF THE CLERK

No. 01-1501

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

GRAY DAVIS, et al., *Petitioners,*

v.

JOHN ARMSTRONG, et al., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
PAUL D. GIFFORD
Senior Assistant Attorney General
SUSAN DUNCAN LEE
Supervising Deputy Attorney General
*FRANCES T. GRUNDER
Supervising Deputy Attorney General
*Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5723
Fax: (415) 703-5843
Counsel for Petitioners

6 pp

IN THE SUPREME COURT OF THE UNITED STATES

No. 01-1501

GRAY DAVIS, et al., *Petitioners,*

v.

JOHN ARMSTRONG, et al., *Respondents.*

PETITIONER'S REPLY BRIEF

Petitioners seek a writ of certiorari to resolve the circuit conflict regarding the proper test for determining the existence of state-created liberty interests in state parole proceedings. The test set forth in *Sandin v. Conner*, 515 U.S. 472 (1995), looks to the nature of the interest while the test used in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), parses state statutes and regulations searching for "mandatory language" and "substantive predicates." Respondents claim there is no circuit split on this issue of national importance, because the cases that apply the *Sandin* test involve conditions of confinement while those that apply the pre-*Sandin* methodology of *Greenholtz* involve the length of confinement. Other than confusion in the circuits as to what test to follow, there is no distinction between the types of cases.

State custody is a continuum of conditions ranging from administrative segregation on the one end to supervised release on the other. There is no rational reason to change the method for determining state-created liberty interests as the nature of the custody changes. Whether a prisoner has a liberty interest at all

may be affected by his or her place on the continuum, but the test for determining whether it exists should not be.

Respondents attempt to explain away the circuit split over which test to apply by contending that the conditional-release cases that applied the *Sandin* test were conditions-of-confinement cases and have no bearing on this case, which they characterize as a length-of-confinement case. Opp. at 11; *see, e.g., Dominique v. Weld*, 73 F.3d 1156 (1st Cir. 1996); *Asquinth v. Department of Corrections*, 186 F.3d 407 (3d Cir. 1999); *Callender v. Sioux City Residential Treatment Facility*, 88 F.3d 666 (8th Cir. 1996). Under Respondents' proposed distinction, prisoners at both ends of the continuum–those whose privileges are restricted by administrative segregation as in *Sandin* and those already enjoying the freedoms of conditional-release programs–would be subject to the *Sandin* test. Implausibly, prisoners in the middle–those like the prisoners here who are serving life terms and can only hope to be paroled–would be subject to the *Greenholtz* test. Such a scheme would compound the confusion that currently exists among the circuits, and also risks interfering with the States' ability to predict the effect of their regulations regarding length and conditions of confinement.

Respondents characterize this case as one involving the length of confinement rather than the conditions of confinement. But it is important to remember that the prisoners here are serving term-to-life sentences. The inmates' sentences cannot be shortened by, for instance, restoring lost sentence credits. The issue here–whether a prisoner has a state-created liberty interest in receiving certain procedures at a parole-consideration hearing–does not inevitably affect the length of his or her sentence. If a prisoner received an unfair parole-consideration hearing it does not follow that the prisoner would automatically be entitled to release if he or she received a fair hearing.

Moreover, a denial of parole merely means that the inmate must serve the life sentence originally imposed. This Court has recognized that *Sandin* applies to clemency proceedings, which share many of the same discretionary aspects as parole for life prisoners, and that a "denial of clemency merely means that the inmate must serve the sentence originally imposed." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 283 (1998). Here, because the length of confinement is for life, everything that relates to the period of confinement becomes a condition of it. The two concepts are inseparable. And regardless of how the argument is cast–conditions or length of confinement–the test for determining whether a liberty interest exist must be the same.

Again attempting to explain away the circuit split, Respondents characterize a case that recognized the *Sandin* test as appropriate for parole cases, *Hamm v. Latessa*, 72 F.3d 947 (1st Cir. 1995), as irrelevant because it only involved the state-law question of when a parole hearing should be held. Opp. at 10. On the contrary, the *Hamm* court framed the question before it as follows: "[T]o determine whether the respondent's application of its parole scheme, deemed lawful by the state's courts, violated the Due Process Clause." *Hamm*, 72 F.3d at 955. The *Hamm* court recognized that after *Sandin* "the tectonic plates [had] shifted"; no longer would courts comb state statutes searching for the presence or absence of mandatory language, but instead they would focus on the nature of the liberty at stake. *Id.* at 954. The *Hamm* court then deferred to the state court's previous interpretation of its parole statutes as conferring no right to the parole hearing at issue and found that federal due process was satisfied. *Id.* at 955-56.

Similarly, the Respondents argue that *Orellana v. Kyle*, 65 F.3d 29 (5th Cir. 1995), does not implicate a circuit split. Opp. at 10. But indeed it does. As in *Hamm*, the *Orellana* court recognized the *Sandin* test applied to parole proceedings, but because the state courts had previously held that the parole statutes conferred no liberty interests, the inmate could not

"complain of the constitutionality of procedural devices attendant to parole decisions." *Orellana*, 65 F.3d at 32.

In sum, the circuits are split on this issue of national importance, and this Court should grant the petition to resolve the split and to provide guidance to the lower courts.

Dated: August 23, 2002

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

PAUL D. GIFFORD
Senior Assistant Attorney General

SUSAN DUNCAN LEE
Supervising Deputy Attorney General
*FRANCES T. GRUNDER
Supervising Deputy Attorney General
*Counsel of Record

Counsel for Petitioners